[redacted]

IN THE

Supreme Court of the United States

October Term, 1963

No. 34

Stewart L. Udall, Secretary of the Interior,
Petitioner

v.

James K. Tallman, et al., Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

[redacted]

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PETITION FOR REHEARING

Respondents respectfully pray that a Rehearing in this case be granted.

POINTS RELIED UPON FOR REHEARING

On March 1, 1965, this Court in an opinion delivered by the Honorable Chief Justice Earl Warren reversed the judgment of the Court of

Appeals for the District of Columbia Circuit, which had ordered judgment entered for the Respondents.

It is the Respondents belief that the opinion of this Court is in error in the following respects:

I.

That the opinion failed to consider the improper preferences granted the *Amici* Oil Companies after allowing them to drill in the Swanson River Area of the Moose Range, under a specific contract.

II.

The opinion has apparently found as a fact, that:

> "... the Secretary has consistently construed both orders not to bar oil and gas leases; moreover, this interpretation has been made a repeated matter of public record."[1]

This finding has been made without a single word of competent testimony taken before any tribunal, and if the Court below was in error in arriving at an opposite conclusion, then so is this Court since this issue has never been tried. Further, the Respondents contend that an open examination of the facts before some trial Court would establish by more than a preponderance, that prior to the order of January 8, 1958, the Secretary *had* interpreted the orders as barring oil and gas leasing.

[1] Orders are Executive Order 8979 and Public Land Order 487.

III.

The Court's finding that

> "... respondents do not claim to have relied to their detriment upon a contrary construction."[2]

is not supported by the record, and a trial of this issue will clearly establish both reliance and detriment.

IV.

That in arriving at the decision, this Court has given unwarranted weight to a hearsay document that is not in evidence, has not been offered in evidence, is not authenticated, and is not a matter of public record, namely the Memorandum dated August 31, 1953 and purportedly signed by the Acting Director of the Bureau of Land Management.

V.

The inference in the opinion that the Court of Appeals failed to attach proper significance to the administrative practice because of misinformation may be in error since the granting of leases was brought to the Court's attention.

VI.

The opinion has misinterpreted the fish trap exception because of a misunderstanding of the

[2] Slip Opinion page 3

nature of traps; that a trial or hearing on this factual issue would show the intentional inclusion of the exception clause, showing an intent to preclude oil and gas leasing at the time of issuing Executive Order 8979.

DISCUSSION

I.

The impropriety of granting preferences after the discovery in Swanson River Area, has never been touched on by any Court. Yet the regulations adopted in 1958[3] did result in such preferences, particularly as to *Amici* Standard and Richfield, since obviously fashioned to prefer the "suspened" applications.

The opinion noted the various agreements between the different branches of Interior and Congress[4], but in addition to such agreements the Swanson River Area differed from regular leasing in that a specific contract was entered. The only evidence of this, however, appears in a letter dated August 7, 1953 from the Director of Fish and Wildlife Service to the Director, Bureau of Land Management, wherein the contract was referred to under a specific number, 14-08-001-2969.[5]

It is common knowledge that oil well drilling is generally kept under "top secret" security. Thus, under a special contract with the Interior Department, the *Amici* were given access to an area of public domain, acquired specialized geo-

[3] 43 CFR 192.9 and 23F.R. 5883
[4] Slip Opinion page 10
[5] Appendix 11a Respondents brief in this Court.

logical information which was kept secret, then given leasing preferences in areas adjoining the unit covered by the contract.

Improprieties in leasing procedures in the Moose Range affect not only Respondents, but the entire State of Alaska. The Mineral Leasing Act of 1920 would require competitive leasing of the known geological structure, of areas not yet leased, when the structure became known.

Instead of following the Mineral Leasing Act of 1920, the preferences noted above were given. The net result is a loss of bonuses to the Federal Government possibly as high as $100,000,000.00, 90 per cent of which would go to the State of Alaska.[6]

Amici would would probably deny the latter estimate, but they have misled the Courts before by inferring that they would lose their investments in the Kenai. They have far more than recovered their investments by the 40,953,128 barrels of crude recovered through March 1, 1965.[7] At the well-head price of $3.00 per barrel this is over 122 million dollars.

Even after the deduction of royalties the *Amici* would have a substantial profit over and above all costs to date, according to the figures in the briefs that have been filed in the Court below and here. The *in terrorem* argument should not be permitted to out-weigh the improprieties of the preferences noted.

II.

The vice of the Court's finding lies not only in

[6] 30 USCA 191

[7] Alaska Department of Lands, Mines and Minerals Publication for April, 1965

the resort to matters *dehors* the record, but is a finding that will not stand if the issues were tried.

No hearings for the determination of factual issues have been held in this matter, at any administrative level or in any Court. This includes the District Court which had entered summary judgment against the Respondents based upon "there being no genuine issues of material fact. ."

In view of this Court's holding, that, essentially, the Secretary's interpretation determines whether or not the lands were open to lease offers, the determination of such Secretarial interpretation is vital. The record, however, shows that the question was presented to the District Court, but never resolved by trial. In Respondents' *Statement under Rule 9(h) to accompany Plaintiff's Motion for Summary Judgment filed August 23, 1962*[8] the last sentence of Paragraph 2. stated:

> "... so that the lands involved in this case first became open to lease offers thereunder on August 14, 1958.[9]"

In response to this statement, urged as a fact by the Respondents, the Petitioner, in an instrument entitled *Defendant's Response to Plaintiff's Material Facts - filed September 4, 1962* stated:

> "2. Defendant controverts the statement in the last sentence of paragraph 2, to the effect that the lands involved in this case first became open to lease offers on August 14, 1958[10]."

[8] TR 73
[9] TR 74
[10] TR 78

This controverted issue was, therefore, clearly presented to the District Court, but apparently resolved, without trial, through allegations and inferences. No specific finding was made by the District Court, but the issue was presented so the Court in granting Summary Judgment, presumably resolved it against the Respondents.

With no trial record settling this issue, the Court of Appeals must have followed a similar method, but decided the issue in favor of Respondents.

This Court, still without benefit of trial, finally resolved the issue, for the third time, against Respondents.

The lack of record is possibly responsible for some of the terminology appearing speculative in the opinion:

"Had the Secretary thought . . ."[11]

"... if the Secretary had meant to exercise such power: . . ."[12]

"Submission of a plan. . . *might have been* regarded. . ."[13]

"The applicants *may have submitted*. . ."[14]

It is the Respondents contention that if the issue concerning the status of the Moose Range with respect to leasing were aired in a public hearing or trial, that clear and convincing evidence could be elicited showing that the Moose Range was considered closed to oil and gas leasing by the various agencies and employees of the Interior Department. This would include testimony of the

[11] Slip Opinion page 5
[12] Slip Opinion page 8
[13] Slip Opinion footnote page 11
[14] Slip Opinion footnote page 11

Range Manager and others associated with control of the range in addition to the Bureau of Land Management personnel. Further, homesteaders and residents in the area of the Moose Range would overwhelmingly show that the Moose Range was closed to the general public as far as leasing was concerned.

The determination of this issue should be made by some means other than inferences and self-serving statements made after the leasing was authorized by the Orders of 1958.

III.

Respondents *have* relied upon the contrary construction and their detriment is certainly overwhelming, since their lease applications were denied. Respondents, along with the general public were led to believe that the Moose Range was closed to oil and gas leasing. In addition to the information that was available in Alaska, Respondents also relied upon the matters of public record. If this were misinformation, it could possibly be due to the treatment of the Alaska people by the Interior Department as second class citizens, and prior to Statehood such abuses were rampant.

At the time of the leasing activity in the Moose Range, the Alaskan people were still disenfranchised colonials, with no voting power in either Congress or for the President. As a result of this political condition, the Interior Department could, and did, treat the rights of the Alaskan people lightly. For an example of some of the abuses, see the discussion concerning fish traps *infra*, but also see the publications

covering the hearings upon the mineral rights for Alaskan Homesteaders.[15] The hearings are too extensive to cover adequately in this petition, but there is an extensive showing that the Interior Department, and in particular the Bureau of Land Management, was discriminatory towards Alaskans and was guilty of other improprieties.

It is interesting to note that the abuses against homesteaders were aired and remedied only after Alaska acquired Statehood[16] and had Senatorial representation. The hearings were conducted by Alaska's Senator Ernest Gruening.

Until this case came to this Court, the issues were limited to the ten leases that were actually in controversy. Both the summary judgment of the District Court and the judgment of the Court of Appeals dealt only with the ten leases in controversy. The Government as well as Respondents at all stages limited the case to these particular leases. However, the opinion in this case expands the decision far beyond the issues heretofore presented, and the determination made from material outside the record and affidavits first presented in this Court. By far the major part of the opinion is based upon facts and material which the Respondents have not yet had the chance to controvert.

If the case were remanded and Respondents given a chance to bring forth the full facts, the following are a few of the facts that can be shown:

[15] HEARINGS Before the SUBCOMMITTEE ON PUBLIC LANDS of the COMMITTEE ON INTERIOR AND INSULAR AFFAIRS UNITED STATES SENATE Eighty-Sixth Congress, First Session on S.1670, of June 19, 1959 and Part 2 of October 28 and November 3, 1959.

[16] Public Law 85-508; 72 Stat. 339

1. The so-called Griffin group are not independent individuals as the Government asserted for the first time in this Court, but were agents and representatives of the major oil companies as found by the Court below and undenied at that time by *Amici*.
2. That all of the offers filed in 1954 and 1955 for lands in the Kenai National Moose Range were, with minor exceptions, filed by the agents and representatives of the *Amici* oil companies in a planned raid upon hitherto assumed closed national wildlife refuge. It was no accident that so many of the oil company offers were filed on about the same date.
3. That prior to the time of the 1954, 1955 oil company offers, and for some time thereafter, the official policy of the Department of Interior made known to the public through the local land office officials was that the lands were closed to leases under the terms of the 1941 Executive Order.
4. That the *Amici* oil companies had inside information from within the Department, and pressures were being brought to bear to change this policy and permit leasing of the Kenai and other wildlife refuges.
5. Respondents, in no way connected with the oil companies, relied on the announced position of the local officials and believed the lands to be closed.
6. That subsequently, officials in the Department of Interior who were in favor of oil companies developing refuges announced for the first time in 1956 (in hearings) that they considered

such land open. However, the matter was even then never clearly set forth with respect to the Kenai refuge and the December, 1955, regulations were ambiguous with respect thereto.

7. That prior to 1958 there were no leases issued in the closed area in the Kenai Range with the exception of the Swanson River Unit, discussed in I. above.
8. That the peculiar circumstances surrounding the creation of the Swanson River Unit has never been put before the Court except for a distorted partial presentation.
9. That prior to the time that the lands were declared to be open to lease offers in August, 1958, the Respondents filed lease offers for nine of the same ten leases in April, 1958, which were rejected by the Department on the ground that until August, 1958, the lands were closed to the filing of lease offers. However, the Department did not reject the lease offers filed in 1954 and 1955 by the oil company representatives, referred to as the Griffin leases.
10. That the public, and Respondents in particular, have never had an equal chance to submit offers on the lands involved herein for the reason that the Secretary has orbitrarily administered public land laws in such a way as to improperly favor the acquisition of these lands by major oil companies, and that *at best* such improprieties were of extremely questionable ethical character.

The Respondents propose to obtain affidavits that will make a showing that the public was led to

believe by the Department of Interior employees that the Moose Range was closed to oil and gas leasing during the times pertinent herein. However, because of lack of time they may not be obtained at the time of filing this petition.

IV

There can be little doubt but that this Court placed great reliance upon the intra-agency Memorandum as follows:

> "Action on them was suspended in accordance with the 1953 directive, but none was rejected on the ground that the land in question was closed to leasing."[17]

How a defective piece of hearsay can be given the force of a "directive" is not explained. Particularly inconsistent with this reasoning is the observation in the opinion two pages later setting forth certain procedures:

> "Moreover, the President's 1952 delegation to the Secretary of power to make or modify withdrawals had directed that '(a)ll orders issued by the Secretary of the Interior under the authority of this order *shall be designated as public land orders* and shall be submitted ... for filing and for publication in the FEDERAL REGISTER.' Executive Order No. 10355, 17 Fed. Reg. 4831 (emphasis added)."[18]

[17] Slip Opinion page 6
[18] Slip Opinion page 8

If the letter was published, no evidence of such appears in the record. Yet the Executive Order requiring publication of withdrawal modifications was in effect. In all probability, the Griffin lease applications would have been rejected except for this questionable document, not a public record.

The dangers of relying upon unauthenticated hearsay material, which is not in the record, are elementary, but in the case at bar, they are even more patent. The letter was apparently directed "*Regional Administrators, Regions 1 to 7, inclusive; Managers Land and Land and Survey Offices*",[19] but there is no showing that this letter is applicable in any way to Alaska or to the refuge involved herein. More than a little explanation would be in order, since it is reported that Alaska is not in any region of the Bureau of Land Management at the present time, and has not been for many years, although it is reported to be in Region 10 of one of the Interior Departments.[20]

Again the basic defect stems from the fact that material considered is not in the record and has not been exposed to the light of a trial of the issues. A trial would determine the authority of the Acting Director, the time given effect, and of particular interest to this case, the effect of the letter on the Moose Range.

V

Because of the complex factual pattern it is true that Respondents inadvertently stated that

[19] Brief of Amici Curiae Marathon Oil and Union Oil page 13a Appendix
[20] Information received from Anchorage Bureau of Land Management

no leases were granted prior to 1958. This inadvertence was, however, roundly belabored by Amici Curiae in their *Motion for Leave to File and Brief of Richfield Oil Corporation, as Amicus Curiae in Support of Appellee's Petition for Rehearing*[21] and it can hardly be claimed that the Court of Appeals had no knowledge of such leasing prior to their final action in this matter. In addition, the Respondents' brief entitled *Objection of Appellants To Motions For Leave to File Briefs Amicus Curiae by Richfield Oil Corporation, Shell Oil Corporation and Standard Oil Corporation of California* expressly covered the Swanson River leases and those of the excepted area.[22]

No attempt was made to mislead the Court of Appeals, but if the Court had lacked information when the opinion was issued the matter had been corrected by the briefs, and presumably considered, when the Court ruled on the Petition for Rehearing.

VI

The lack of a record is glaringly apparent in this Court's interpretation of the fish trap exception.[23] A trial would show that the exception was not designed to "assure the Alaskans," but was designed to protect the absentee cannery owners who operated traps. It could be shown further that the traps were actually depriving Alaska fishermen of a livelihood dependent upon the salmon catch, since the canneries that had traps did not need fishermen. And a trial could also

21 Page 11-12 of cited brief
22 Pages 5 and 6 of cited brief
23 Slip Opinion page 21

show the intentional nature of the inclusion.

The opinion refers to *Organized Village of Kake vs. Egan, 369 US 60,* but that decision appears inapplicable to the Kenai Penninsula and Western Alaska. The village of Kake is about seven hundred fifty miles from the Kenai area and involves a communal village of natives who did operate a trap for the benefit of the village. However, the dissent from the extension of the stay in *Kake* brings out facts which show that the conclusions reached in the opinion herein are incorrect. In quoting from Senator Gruening's book, the opinion noted:

> "Beginning in 1931 the Territorial Legislature memorialized Congress condemning the use of the fish trap because of its adverse effect on salmon and on the salmon industry."[24]

Further on the same page the opinion noted a statement by Senator Gruening:

> "In a referendum on fish traps in 1948, 88.7% of the people of Alaska voted for trap abolition, and Angoon's vote was 49 to 9 and Kake's 123 to 6 against traps. Yet Secretary Seaton sought to force traps upon them and on the people of Alaska."[25]

The opinion on the same page takes notice of the Alaska State Supreme Court's attitude toward fish traps:

> "The devastating effect of fish traps upon Alaska's economy was described by the Alaska Supreme Court: . . . "[26]

The Alaska Supreme Court explained the destructiveness of the traps and referred to the

[24] Kake Village vs. Egan page 78
[25] Kake Village vs. Egan page 78-79
[26] Kake Village vs. Egan page 79

Secretary's regulations as "discrimination against all fishermen."[27]

In addition to the action of the Legislature and the Referendum of 1948 the people of Alaska again voted for the abolition of fish traps when voting upon the ratification of the Consititution"[28], and traps were finally outlawed by statute.

From the foregoing it is apparent that the opinion's interpretation of the fish trap exception is incompatible with the attitude of Alaskans toward fish traps.

This Court also refers to Executive Order No. 8857, 6 Fed. reg. 4287, establishing the Kodiak refuge.[29] Apparently the Court noted that the Executive Order did not include the fish trap exception. But the reason is quite obvious, since the Kodiak refuge specifically excluded the shore area where traps would be anchored by the following:

> "...except a strip one mile in width along the shore line,..."

Instead of being "carelessly placed" the fish trap exception in Executive Order 8979 was probably the most intentional wording in the entire order.

SUMMARY

During oral argument, the lack of a record was highlighted by one of the questions asked by one member of the Court;

> "Do you want us to try this case on affidavits here?"[30]

[27] Kake Village vs. Egan, page 79
[28] Ordinance No. Three, Section One, Constitution of the State of Alaska
[29] Slip Opinion page 21
[30] Questioning by Mr. Justice Goldberg - (wording may not be exact, but is according to recollection of counsel)

Perhaps worse than trying the case on affidavits presented in the Supreme Court would be the determination of the issues based upon inferences, allegations and other evidence not in the record, and presented for the first time to this Court. This would actually deprive Respondents of rights that are normally protected by our highest court. Yet respondents contend that this, substantially, has happened.

Only by remanding this case for determination of factual issues such as Secretarial Interpretations, improprieties in leasing, information given the public, and other issues, can the ultimate issue of who are entitled to the 10 leases herein be settled. Respondents claim that it will be shown clearly to be them.

Respondents respectfully pray that this Petition for Rehearing be granted and that this case be remanded for the taking of further evidence and for establishing the factual issues relevant to the determination of who is entitled to the leases involved herein.

Respectfully submitted.

James K. Tallman
213 Central Building
Anchorage, Alaska
in propria persona,
and as Attorney for
other Respondents

April 3, 1965

CERTIFICATE OF GOOD FAITH

I, James K. Tallman, appearing *in propria persona*, and as Attorney for the other Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

James K. Tallman

PROOF OF SERVICE

I, James K. Tallman, appearing *in propria persona*, and as Attorney for the other Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that upon the 3rd day of April, 1965, I served copies of the foregoing Petition for Rehearing upon Counsel for the Petitioner, and *Amici Curiae* as follows:

1. On Counsel for the Petitioner, by mailing three copies in a duly addressed envelope thereof and sent to the office of:

   Solicitor General
   Department of Justice
   Washington 25, D. C.

   by airmail, postage prepaid.

2. On Counsel for *Amici Curiae*, by mailing three copies each in a duly addressed envelope

with airmail postage prepaid, to the respective attorneys, as follows:

TO: Clayton L. Orn
Attorney for Amicus Curiae Marathon Oil Company
Marathon Oil Company Building
Findlay, Ohio

TO: Marion D. Plant
Attorney for Amicus Curiae, Union Oil Company of California
111 Sutter Street
San Francisco, California

TO: William J. DeMartini
Attorney for Amicus Curiae
Richfield Oil Corporation
Richfield Building
Los Angeles, California

TO: Clark M. Clifford
Attorney for Amicus Curiae
Standard Oil Company of California
1523 L Street, Northwest
Washington, D. C.

James K. Tallman